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Receivables Financing

Draft Convention on Assignment of Receivables in International Trade: comments on pending and other issues

Note by the Secretariat

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I. Introduction

1. At its thirty-third session, the Commission adopted the title, the preamble and articles 1 to 17 of the draft Convention on Assignment of Receivables in International Trade.[1] The remaining articles of the draft Convention that were referred back to the Working Group on International Contract Practices were adopted by the Working Group at its last session (Vienna, 11 to 22 December 2000).[2]

2. As indicated by the bracketed language in the text of the draft Convention or by references below to the report of the Commission or of the Working Group, no final conclusion was reached on certain issues. In addition, certain other issues are raised by the Secretariat with the question whether the relevant provisions are sufficient to meet their stated objectives. This note has been prepared in order to give delegates to the Commission advance notice of those issues and of alternative ways in which they could be addressed. It is hoped that such advance notice will assist the Commission in resolving those issues in a timely manner and finalizing the draft Convention within the limited time that will be available to the Commission.[3]

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[1] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 180-183; UNCITRAL Yearbook, vol. XXXI: 2000.

[2] Ibid., para. 186. The consolidated text of the draft Convention appears as annex I to the report of the Working Group (A/CN.9/486).

[3] The draft Convention is to be discussed from 25-29 June and, if necessary, on 2 July 2001. The drafting group may have to work until 5 July and the adoption of the report of the drafting group may have to take place on 5 July, depending on the time needed for the Commission and the drafting group to complete their work.

II. Comments

A. Articles 18 to 47 and Annex: issues referred to the Commission by the Working Group

1. Characteristics and priority of the assignee's right in proceeds (article 24, para. 1 (b))

General remarks

3. At its last session, the Working Group decided to retain article 24, paragraph 1 (b), within square brackets referring to the Commission the question whether it should be retained and, if so, in what form (see A/CN.9/486, para. 61). In determining whether to retain article 24, paragraph 1 (b), or not, the Commission may wish to take into account the relationship between articles 24, paragraph 1 (b), and 26, the real import of article 24, paragraph 1 (b), and its acceptability.

Relationship between articles 24, paragraph 1 (b), and 26

4. With the current structure of articles 24, paragraph 1 (b), and 26, their relationship is not very clear. While they both deal with proceeds, article 26 is a substantive law rule and article 24, paragraph 1 (b), is a private international law rule. Article 26 covers the specific situations in which payment is made to the assignee or to the assignor but the assignor holds the proceeds in a separate account on behalf of the assignee. It would, therefore, seem that article 24, paragraph 1 (b), would cover situations in which payment is made to the assignor or to another person and proceeds of the assigned receivable are commingled with other assets of the assignor or that other person. If the Commission decides to retain article 24, paragraph 1 (b), it may wish to recast it in a new provision combining articles 24, paragraph 1 (b), and 26.

Limitations of article 24, paragraph 1 (b)

5. As mentioned, article 24, paragraph 1 (b), would apply in the case of proceeds that are commingled with other assets of the assignor. However, if proceeds are not identifiable as "whatever is received in respect of an assigned receivable" (see article 5 (j)), article 24, paragraph 1 (b), may not even come into play (unless the law applicable is familiar with the notion of proceeds and tracing of proceeds). The situation is different in article 26, which envisages clearly identifiable proceeds.

Acceptability of article 24, paragraph 1 (b)

6. The general question that the Commission may wish to address is whether priority issues relating to certain types of asset, the assignment of which has been excluded from the draft Convention, should be addressed if those types of asset are proceeds derived from receivables. The Commission may wish to consider addressing the question for each of those types of asset.

Securities

7. It would seem that there is sufficient momentum in favour of the place of the relevant intermediary approach ("PRIMA", which in essence refers to the location of the account) with respect to the law applicable to dispositions of securities. PRIMA is considered by the Hague Conference on Private International Law and by the Commission of the European Union. It is also already reflected in the law of some countries (e.g. article 29 of law no. 83-1 of 3 January 1983 in France, article 9, paragraph 2 of the European Union Directive on Settlement Finality and article 8-110 of the Uniform Commercial Code in the United States of America). Furthermore, it is currently under consideration in other countries (e.g. Australia, Canada, Japan, the Netherlands

and the United Kingdom). However, the exact formulation of PRIMA is a matter that still remains to be considered. In particular, it is not clear yet to what extent the account holder and the relevant intermediary will be allowed to specify in their custody agreement the location of the account without the need for an objective connecting factor. Furthermore, it is not absolutely clear what the terms "location", securities", "securities account" or "securities intermediary" mean exactly.[4]

8. This situation presents both a problem of substance and a problem of procedure for the Commission. The problem of substance relates to whether PRIMA should be adopted and, if so, in what form. The problem of procedure relates to whether the Commission could adopt PRIMA without co-ordinating with the work of the Hague Conference, since it is highly unlikely that a text will emerge from the Hague Conference by the time the Commission has to adopt the draft Convention. In addressing this matter, the Commission may wish to consider the possible alternatives.

9. One alternative would be for the draft Convention to include a free-standing PRIMA-based rule. The advantage of such a rule would be that it would provide sufficient certainty as to the law applicable under the draft Convention. The disadvantage of such an approach though would be that efforts to prepare such a rule would go far beyond this project and would risk producing a result that would be inconsistent with the text being prepared by the Hague Conference. Another alternative would be for the Commission to include a rule that would set the principle of PRIMA without going into any details for which reference would be made to other texts. The advantage of this approach would be that it would recognize PRIMA as a matter of principle. Its disadvantage though would be that it would not provide sufficient guidance. In addition, it could create problems of co-ordination, in particular if the rule of the draft Convention were to be read as a free-standing rule to be interpreted without reference to the text of the Hague Conference.

10. Yet another alternative would be to provide in the draft Convention that issues of priority would be governed by the law applicable under private international law rules applicable with respect to the relevant types of asset. The commentary could further elaborate on the PRIMA-based approach as the increasingly prevailing approach with respect to disposition of property rights in securities. The advantage of this approach would be that it would reflect a generally acceptable principle without prejudging what the law applicable might be. Its disadvantage, however, would be that such a provision would be unnecessary as stating the obvious, without providing any guidance as to the law applicable. Yet another alternative would be to address the matter only in the commentary. The commentary could refer to PRIMA as being the preferred approach to be reflected in the text of the Hague Conference. The advantage of this approach would be that, through the discussion of the matter in the commentary, the Commission would give as much guidance to States as can be given, without burdening the draft Convention with provisions that do not set clear rules. The Commission may, therefore, wish to delete article 24, paragraph 1 (b) (ii), and to address the matter in the commentary with a view to clarifying the advantages of PRIMA and to referring to the Hague Conference text.

Deposit accounts

11. With respect to article 24, paragraph 1 (b) (iii), the Commission may wish to consider following an approach similar to the approach to be followed with respect to securities. It would appear that there are strong arguments in favour of the law of the country in which the depository institution is located (see A/CN.9/486, para. 58). The reference to the law of the bank's location

[4] Both the draft that emerged from a meeting of the Hague Conference in January 2001 and the current proposal by the Commission of the European Union for a Directive allow parties to the custody agreement to specify the location of the account. However, there is one condition, namely that that there is an objective connecting factor (i.e. the place is specified is the place where the relevant intermediary has an office or branch and from which the intermediary reports to its account holders or for regulatory or accounting purposes). However, both drafts are in the form of working documents subject to further discussion.

could also be read as a reference to the location of the account (a PRIMA-like approach). However, a reference to the law of the bank's or the account's location would be inconsistent with the approach taken in jurisdictions that refer to the law of the assignor's location. Furthermore, an effort to define the location of the bank or the account may re-open the difficult questions the Commission had to address in defining "location" for the purposes of the draft Convention. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (iii), and leaving the matter to the commentary, either with a clear recommendation as to the law applicable (if the Commission promptly reaches agreement on such a recommendation) or with an analysis of the alternatives (if the Commission does not reach such an agreement).

Negotiable instruments

12. The law applicable to priority in negotiable instruments may be less controversial than the law applicable to priority in securities or in deposit accounts. However, article 24, paragraph 1 (b) (i), raises an issue of overlap with article 24, paragraph 1 (b) (ii). Negotiable instruments may well include securities if they are evidenced by certificates transferable by delivery (with any necessary endorsement). In addition, priority with respect to securities held directly by their owner may need to be also referred to the law of their location (*lex rei sitae*), since it is the indirect holding pattern that justifies the replacement of the *lex rei sitae* by PRIMA. However, it is questionable whether a rule on priority in negotiable instruments only would be sufficiently useful without a rule on securities and deposit accounts. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (i), and including the relevant analysis in the commentary with a view to providing guidance to States.

Relationship between article 26 and the Hague Conference text

13. In principle, it would appear that no conflict could arise between article 26 and the Hague Conference text, since article 26 is a substantive law provision, while the Hague Conference text is a private international law text. Under article 26, if the assignee has priority with respect to the receivable and the conditions of paragraphs 1 and 2 are met, the assignee has priority with respect to proceeds of the receivable as against a competing assignee of the receivable or of the proceeds (as original collateral), as against a creditor of the assignor (including a creditor with a right in proceeds as original collateral) and as against the administrator in the insolvency of the assignor. If the place of the relevant intermediary is a State party to both the draft Convention and the Hague Conference text (and the draft Convention applies because the assignor is located in a Contracting State), article 26 would be the law of the place of the relevant intermediary. There would be no conflict in this case between article 26 and PRIMA. If, however, the place of the relevant intermediary is not a State party to the draft Convention (and the draft Convention applies because the assignor is in a Contracting State), article 26 would be a law other than PRIMA (and, as a result, an intermediary may find that it does not have priority even though it did all it could in that regard under PRIMA).

14. It would, therefore, appear that different results would be reached depending on whether article 26 or PRIMA applies. However, even in this case the conflict is rather apparent than real. If the receivable is paid to the assignee (article 26, paragraph 1), there are no proceeds in which an intermediary may have a right as creditor of the assignor. If the receivable is paid to the assignor (article 26, paragraph 2) and is held in a segregated account, an intermediary would normally have no right in such an account since securities covered by netting agreements are not in such a segregated account. To enhance certainty with regard to an intermediary, the need for notice to an intermediary (or any depository institution) about the nature of the account may need to be further clarified in article 26, paragraph 2. A new subparagraph (a*bis*) could read along the following lines: "notice to that effect is given to a person holding a right created by agreement which not derived from the receivable or a person with a right of set-off". The commentary could explain that the right meant may be a security right or the right of a purchaser of the relevant property. In current subparagraph (b), after the word "deposit" the words "or securities" would need to be added to cover both deposit and securities accounts. The commentary could also explain that article 26 is not intended to and does not create any conflict with PRIMA.

15. Alternatively, the Commission may wish to ensure that the rights of a depository institution or a securities intermediary or an assignee of the bank or securities account as original collateral would not be affected by article 26, paragraph 2. Language along the following lines may be considered: "Nothing in paragraph 2 of this article affects the priority of a right, not derived from the receivable, of a person holding a right created by agreement or of a person holding a right of set-off".

16. With such an approach, while article 26, paragraph 2, would apply in general, its real impact would be limited to conflicts between an assignee of the receivable claiming the account as proceeds and creditors of the assignor or the insolvency administrator. This result would be justified by the fact that such persons would normally not be extending credit to the assignor in reliance on the relevant bank or securities account. Article 27 would also apply to validate a subordination agreement between a depository institution or a securities intermediary and an assignee.

2. Existence and characteristics of the right of a competing claimant in proceeds (article 24, para. 1 (c))

17. The above-mentioned analysis with respect to article 24, paragraph 1 (b) would apply also to article 24, paragraph 1 (c). In attempting to provide certainty as to the law applicable to the existence and the characteristics of the rights of a competing claimant, this provision adds an additional level of complexity to the draft Convention. In addition, it deals with issues that may go well beyond the scope of the draft Convention. Moreover, this provision may be inappropriate to the extent that matters, such as the existence of a right, may be subject to the law of the location of the relevant asset (*lex rei sitae*) or to the law governing insolvency (*lex concursus*). The Commission may, therefore, wish to delete article 24, paragraph 1 (c).

3. Characteristics of a right (article 24, para. 2)

18. The characteristics of a right are treated in article 24, paragraph 2 as issues distinct from priority. This approach runs counter to the policy of the Working Group to address that matter only in the context of a priority conflict. It also complicates article 24 unnecessarily. Ensuring that article 24, which is one of the most important provisions of the draft Convention, sets a clear and simple rule may well facilitate its proper understanding and application. The Commission may, therefore, wish to combine the definitions of characteristics and priority, moving article 24, paragraph 2 to article 5, subparagraph (g). Such an approach may also clarify the meaning of the term priority. It could also assist in addressing form requirements for the assignment to be effective as against third parties (this approach is taken in article 5 of the Hague Conference text, of 19 January 2001; article 8 may not be appropriate in addressing form requirements for priority purposes; see paras. 33 and 34). Language along the following lines could be considered for a revised article 5, subparagraph (g): "Priority means the right of a person in preference to the right of a competing claimant and includes the determination whether the right is a property right or not, whether it is a security right for indebtedness or other obligation or not and any steps necessary to render a right effective against a competing claimant".

19. If the Commission decides to follow such an approach, article 24 would read as follows:

"With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26, the law of the State in which the assignor is located governs:

"(a) The priority of the right of an assignee in the assigned receivable with respect to the right of a competing claimant; and

"(b) The priority of the right of the assignee in proceeds that are receivables whose

assignment is governed by this Convention with respect to the right of a competing claimant." (see, however, para. 42).

4. Relationship between the assignee and the debtor (article 20)

20. The Working Group referred to the Commission the question whether the essence of article 30 should be included in article 20. The matter was briefly discussed by the Working Group further to a suggestion aimed at ensuring that the benefits of article 30 would not be lost if a State opted out of chapter V (see A/CN.9/486, para. 83). If that suggestion is acceptable to the Commission, language along the following lines may be considered for article 39: "A State may declare at any time that it will not be bound by chapter V with the exception of articles 30, 32 and 33". Thus, article 30 would continue to apply and its substance would continue to be subject to the principles of mandatory law and public policy (and these principles would continue to be inapplicable to provisions other than those in chapter V). If the Commission prefers to retain the possibility for an opt-out of chapter V as a whole (see A/CN.9/486, para. 111), language along the following lines could be considered: "A State may declare at any time that it will not be bound by chapter V as a whole or by articles 28, 29 and 31 only". Such an approach could increase the flexibility of the draft Convention but could also reduce its unifying effect to the extent that chapter V may apply to differing degrees from State to State.

5. Form (new provision in chapter V)

21. The Working Group referred to the Commission the question whether a provision dealing with the law applicable to the form of the assignment and the contract of assignment should be included in chapter V (see A/CN.9/486, paras. 76 and 174). Such a new provision would provide certainty as to the law applicable to form in cases where article 8 does not apply because the assignor is not located in a Contracting State. If the form of the assignment as against third parties is left to the law of the assignor's location (see paras. 18, 33 and 34) and the form of the assignment as between the assignor and the assignee and as against the debtor is addressed by way of a substantive law rule (see para. 34), all that would remain to be addressed in chapter V would be the law applicable to the form of the contract of assignment. That matter may be left to generally applicable private international law rules on the form of contracts. Alternatively, language along the lines of article 11 of the Convention on the Law Applicable for the International Sale of Goods could be considered:

"1. A contract of assignment concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it or of the State in which it was concluded.

"2. A contract of assignment concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it or of the law of one of those States."

6. Applicable law in territorial units (article 37)

22. The Commission may wish to consider article 37, which appears within square brackets, in the light a proposal to be submitted by certain federal States (A/CN.9/486, para. 97).

7. Reservations and declarations (article 44)

23. At the last session of the Working Group, the view was expressed that equating reservations with declarations might inadvertently result in the application of reservation-related provisions of treaty law, including provisions on reciprocity. This view was based on the assumption that the draft Convention did not authorise any reservations. On that basis, the suggestion was made that

the wording "except those expressly authorised in this Convention" should be deleted or article 44 should be recast to refer to declarations (see A/CN.9/486, paras. 125 and 126).

24. To the extent that articles 36, paragraph 1, 39-41 and 42, paragraph 5, exclude or modify the effect of certain provisions of the draft Convention, they reflect, in principle, reservations. Guideline 1.1.8 "Reservations made under exclusionary clauses" adopted by the International Law Commission during its last session is clear in this respect.[5] In addition, article 17, paragraph 1 of the 1969 and 1978 Vienna Conventions on the Law of Treaties creates a clear link between a provision allowing a State to opt out of a part of a convention and a reservation. If such declarations are made, not at the time of signature or expression by a State of its consent to be bound, they may be viewed either as reservations allowed to be made at any time or as partial denunciations.

25. The Commission may, therefore, wish to retain article 44, which is a standard provision in conventions emanating from the work of the Commission, unchanged. The commentary on article 44 could clarify that articles 36, paragraph 1, 39-41 and 42, paragraph 5, provide for reservations, at least if made at the time of signature or expression by a State of its consent to be bound, while article 37 provides for an interpretative declaration and article 42 has the character of an optional clause. Alternatively, article 44 could be revised along the following lines: "No reservations are permitted except those authorized in articles 36, paragraph 1, 39 to 41 and 42, paragraph 5" [to the extent they are made at the time of signature, ratification, approval or accession]. In order to avoid the technical question addressed in the bracketed language, the Commission may wish to consider formulating article 44 along the following lines: "No reservations are permitted". The commentary could explain that this formulation is intended to avoid this technical question and that it is not intended to change the legal nature of reservations made possible by other provisions.

8. Annex

26. The Commission may wish to consider including in the annex a provision on the designation of the supervising authority, the registrar and the preparation of regulations (see A/CN.9/486, para 153 and 174). Language along the following lines may be considered: "At the request of not less than one third of the [Contracting] [Signatory] States to this Convention, the depositary shall convene a conference of the [Contracting] [Signatory] States for designating the supervising authority and the first registrar, and for preparing the first regulations and for revising or amending them". The Commission may also wish to discuss articles 6 to 9 in the light of a proposal to be submitted to the Commission by States (see A/CN.9/486, paras. 163, 165 and 168).

B. Articles 1 to 17: issues left pending by the Commission or referred by the Working Group to the Commission

1. Exclusions of transfers of negotiable instruments (article 4, para. 1 (b))

27. The Working Group referred to the Commission the question whether transfers of negotiable instruments by delivery without a necessary endorsement or by a book entry into a depository's accounts should be excluded (see A/CN.9/486, paras. 62 and 63). A related question that was also referred to the Commission was whether, if transfers by delivery without a necessary endorsement are not excluded, conflicts of priority relating to such transfers should be referred to the law of the location of the relevant negotiable instrument.

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[5] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), para. 663.

28. The Commission may wish to recall the policy of article 4, paragraph 1 (b) to preserve the rights and obligations of parties under negotiable instrument law, without excluding the assignment of the underlying contractual receivable (see A/55/17, para. 29; and A/CN.9/470, paras. 43 and 44). It would be consistent with that policy to also exclude transfers by delivery without a necessary endorsement or by a book entry if they are regulated in negotiable instrument law. This result could be achieved through language along the following lines: "This Convention does not affect the rights and obligations of any person under negotiable instrument law". This wording would also make it unnecessary to refer to the way an instrument is transferred. It would also result in avoiding excluding the assignment of a contractual receivable just because the receivable is incorporated into a negotiable instrument. Furthermore, it would result in excluding rights of persons under negotiable instrument law, irrespective of whether they are parties to the instrument or not (e.g. attaching creditors).

2. Exclusions by declaration (article 4, para. 4)

29. At the last session of the Working Group, both strong support and opposition was expressed with respect to the possibility for an exclusion of further, existing or future, practices by declaration by States. Particular emphasis was placed on the value of article 4, paragraph 4, in providing flexibility to deal with future practices that cannot be anticipated at the present stage. Existing practices mentioned for such treatment involve receivables from foreign exchange transactions, to the extent they are not already excluded in article 4, paragraph 2 (a) and (b), or receivables from consumer transactions, unless a general consumer-protection provision is included in the draft Convention (see A/CN.9/486, paras. 116 and 117; as to consumer protection, see paras. 38 to 40 below). The Commission may wish to consider excluding those practices directly instead of leaving them to States to exclude by declaration. Such an approach would ensure a higher degree of certainty and uniformity as to the scope of the draft Convention. If such an approach is followed, the potential impact of article 4, paragraph 4 would be limited to future practices. As a result, it may be easier for the Commission to decide whether to retain or delete this provision. If the Commission decides to retain article 4, paragraph 4, it may wish to consider whether it would be consistent with the policy underlying that provision to also allow States to apply the draft Convention to practices to which it is not intended to apply ("opt-in" by declaration by States).

3. Exclusions of transfers of intangible property (articles 11, para. 3 (a) and 12, para. 4 (a))

30. The term "goods" was placed within square brackets, since the reference in the French text to "biens meubles corporels" raised the question whether it includes general intangible property (i.e. intellectual or industrial property or other information; see A/55/17, para. 185). It would seem that intangibles are covered in articles 11, paragraph 3 (b) and 12, paragraph 4 (b). Therefore, the Commission may wish to remove the square brackets around the term "goods" and have the matter clarified in the commentary.

C. Additional issues

31. Depending on the availability of time, the Commission may wish to also consider the following issues.

1. Exclusions of real estate receivables (article 4, para. 3)

32. The Commission may wish to consider whether article 4, paragraph 3 (a) could be replaced by language along the following lines to be added at the end of the proposed new provision with respect to negotiable instruments (see para. 28): "or under real estate law". In such a case, article 4, paragraph 3 (b) could be replaced by language along the following lines to be inserted at the end of article 9, paragraph 3: "including limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate is located".

2. Effectiveness (articles 8 to 12)

Article 8

33. In providing that meeting the form requirements of the assignor's location is sufficient, article 8 provides guidance to assignees as to how to ensure that an assignment will be formally valid. However, if the law of the assignor's location requires, for example, notification for an assignment to be formally (not materially)[6] valid, article 8 is not helpful. In such a case, article 8 would fail, for example, to remove obstacles with respect to the assignment of future receivables in which notification of the debtor is not possible, at least, until the receivable arises and the debtor's identity becomes known. In addition, to the extent that article 8 refers to laws other than the law of the assignor's location, it may be inconsistent with article 24 to the extent that form requirements may be characterised as matters relating to priority.

34. The Commission may, therefore, wish to explore the possibility of including a substantive law rule on form as between the assignor and the assignee, and as against the debtor. A possible approach may be based on the understanding that no form is necessary as between the assignor and the assignee and as against the debtor. As to the assignor and the assignee, party autonomy should prevail. As against the debtor, no form is necessary, since the debtor is sufficiently protected by the requirement for a written notification. Language along the following lines may be considered: "As between the assignor and the assignee and as against the debtor, the assignment need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Under such an approach, article 8 would address formal validity and article 9 material validity. Obstacles created to the assignment of future receivables would be removed in a consistent and sufficiently comprehensive way. To the extent they are necessary for priority purposes, form requirements could be left to the law of the assignor's location (see para. 18).

Article 9

35. In referring to future receivables in general and despite article 9, paragraph 3, article 9, paragraph 1 may inadvertently result in validating an assignment of any future receivables, including consumer receivables or pensions and wages, even though such an assignment is prohibited by law. Therefore, the Commission may wish to reformulate article 9, paragraph 1 along the following lines: "An assignment of one or more existing or future receivables and parts of or undivided interest in receivables is not ineffective as between the assignor and the assignee or as against the debtor and a competing claimant on the sole ground that it relates to future receivables if, at the time of the conclusion of the original contract, they can be identified as receivables to which the assignment relates."[7] The reference to the effectiveness of an assignment between an assignee and a competing claimant is intended to cover the matter addressed in article 9, paragraph 4, which may be no longer necessary.

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[6] If notification is a condition of material validity, article 9 would be sufficient to remove such obstacles.

[7] Article 5 of the Unidroit Convention on International Factoring is formulated along the same lines (" a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually ...").

Article 10

36. The Commission may wish to reconsider whether article 10 should be retained. It would seem that the time of the assignment is important for determining priority and for determining whether an assignment could be set aside as a fraudulent or preferential transfer if made within a certain time period before the commencement of an insolvency proceeding ("the suspect period"). However, the opening words of article 10 take away that effect from article 10 and thus render it meaningless. The term "time of assignment" is used only in draft article 9, paragraph 1 (b), but reference could be made there, as in other provisions (e.g. articles 1, paragraph 1 (a), 3, 4, subparagraph (b), 14, 38, 41 and 6 of the annex), directly to the time of the conclusion of the contract of assignment. As to the issue whether parties to are allowed to set the time of assignment without affecting the rights of third parties, article 10 is still not necessary, since this result is implicit in article 6. The Commission may, therefore, wish to consider deleting article 10.

Articles 11 and 12

37. The policy underlying articles 11, paragraph 3, and 12, paragraph 4, is to *limit* the application of articles 11 and 12 to assignments of *trade receivables* (see A/55/17, paras. 104-108). However, "trade receivable" is defined so broadly that the only import of article 11, paragraph 3 is to exclude from the scope of article 11 the assignment of financial service receivables. The Commission may wish to express that result directly along the following lines: "Article 11 does not apply to assignments of receivables arising from financial service contracts". In order to avoid creating uncertainty, the Commission may also wish to define financial service contracts. However, it would appear that the exclusions of financial service practices in article 4 would be broad enough to, at least, cast some doubt about the value of article 11, paragraph 3. Perhaps, the only practices that are not excluded in article 4 and may need to be excluded in article 11 are those that relate to assignments of loans or of insurance receivables. It would be better to exclude the assignment of those types of receivables directly rather than by way of a vague reference to financial service contracts. Language along the following lines may be considered to replace the current wording of article 11, paragraph 3: "Article 11 does not apply to assignments of receivables arising from loan agreements or insurance policies [...]". Alternatively, if general language is preferred language along the following lines could be considered: "Article 11 does not apply to the assignment of a single, existing receivable" (although this formulation may result in excluding additional practices, such as an assignment of a high-value receivable from an aircraft, real estate or construction contract).

3. Consumer protection issues

38. At its thirty-third session, the Commission decided not to include any language specific to consumer debtors in article 17 on the understanding that it may have to reconsider the matter. A suggestion to include a provision clarifying that the draft Convention would not permit a consumer debtor to vary or derogate from the original contract if that was not permitted under consumer-protection legislation was met with interest but was not adopted (see A/55/17, paras. 170-172).

39. At the last session of the Working Group, the view was expressed that, unless some reference to consumer-protection legislation were included in article 17, certain States might have to exclude practices relating to consumer receivables (see A/CN.9/486, para. 116). In order to avoid such a result, which could inadvertently reduce the value of the draft Convention, the Commission may wish to reconsider the matter. Reconsideration of the matter would not require a policy change. Reflecting the policy of the Commission, the commentary specifically provides that the draft Convention is not intended to override consumer-protection legislation (see A/CN.9/470, para. 128 and A/55/17, para. 170).

40. With respect to the protection of consumers that are assignors, article 9, paragraph 3, may be sufficient in that it provides that the draft Convention does not affect statutory prohibitions. However, article 9, paragraph 3, may not be sufficient to the extent that article 9, paragraph 1, may be read as validating the assignment of future receivables even in the case of consumer receivables. Although the suggested reformulation of article 9, paragraph 1, may address the matter (see para. 35), it may be better to include in the draft Convention language covering consumer assignors as well. The focus may be on an element highlighted during the discussion by the Commission last year, namely on mandatory law provisions that cannot be varied or derogated from by agreement of the parties. With such an approach, it may be possible for the Commission to address the concern expressed, thereby reducing significantly the possibility for a reservation as to the application of the draft Convention to assignments of consumer receivables. At the same time, such an approach would not undermine the certainty sought by the draft Convention or change the policy approved by the Commission. Language along the following lines may be considered for article 4: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes." The commentary could explain that, with the exception of assignments excluded in article 4, paragraph 1 (a), the draft Convention applies to assignments of consumer receivables but is not intended to interfere with domestic internal mandatory consumer-protection legislation. If the Commission adopts the proposed text, the specific reference to consumer protection in articles 21, paragraph 1, and 23 would not be necessary.

4. Debtor's defences and rights of set-off (article 20, para. 1)

41. In some jurisdictions, if the assignment is effective, the debtor may lose any right of set-off. As article 20 does not grant to the debtor a right of set-off if, under law applicable outside the draft Convention, the debtor does not have such a right, the debtor may not have any right of set-off in such jurisdictions. In order to avoid that result, the words "as if the assignment had never been made" could be inserted at the end of article 20, paragraph 1.

5. Priority issues (article 24, para. 1 (a) (ii))

42. Article 24, paragraph 1 (a) (ii) envisages situations in which the debtor pays by assigning a receivable. In such situations, there would be two assignors (the assignor of the original receivable and the debtor/assignor of the receivable assigned in payment of the original receivable). The Commission may wish to consider the question of whose law should govern. The Commission may also wish to consider moving this provision to article 26 so as to concentrate all proceeds-related rules in one article.

D. Procedure for the final adoption of the draft Convention

43. At its forthcoming session, the Commission would need to consider the procedure for the final adoption the draft Convention (see A/55/17, paras. 189 and 192). In determining whether to recommend final adoption of the draft Convention by the General Assembly or by a diplomatic conference to be convened by the General Assembly, the Commission may wish to take into account considerations that influenced the decision of the Commission on this matter in the past. Six conventions have been prepared on the basis of texts elaborated by the Commission. Four were adopted at a diplomatic conference and two were adopted by the General Assembly.

44. Considerations taken into account by the Commission in recommending adoption of a convention by a diplomatic conference include the following: technical texts should be adopted in special meetings of bodies of qualified experts; cost savings from referring a draft Convention to a working group of the Sixth Committee and the General Assembly may be apparent rather than

real (see A/8717, para. 19 and A/CN.9/SR.123; UNCITRAL Yearbook, vol. III:1972); financial implications and invitation by a State (see A/31/17, paras. 39-43; UNCITRAL Yearbook, vol. VII:1976); dispensing with the need for a conference would deprive many States, in particular developing States and States not represented in the Commission, of the opportunity to scrutinise the text and to influence the final content and form of the text; the Commission should conclude in the appropriate way work in which efforts and expenses of a long period of time had been invested (see A/32/17, paras. 20-32; UNCITRAL Yearbook vol. VIII:1977); even a sound legal text could be further improved; and a conference would be the most desirable forum of negotiations between States, specialists and industry (see A/44/17, paras. 223 and 224; UNCITRAL Yearbook, vol. XVI:1985).

45. Considerations on the basis of which the Commission decided to refer a convention to the General Assembly include the following: the expense of a diplomatic conference may not be justified in the case of a text which is the culmination of work of a number of years, has been extensively discussed and has been refined sufficiently to not need any further substantive consideration (see A/42/17, para. 301 and A/50/17, para. 199; UNCITRAL Yearbook, vol. XVIII:1987 and vol. XXV:1995 respectively).

46. In view of the above considerations, the Commission may wish to recommend adoption of the draft Convention by the General Assembly if it is satisfied that the text has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States. In its deliberations, the Commission may wish to also take into account the possibility that a diplomatic conference may change the text of the draft Convention adopted by the Commission, but also the potential for a wider participation by States in a diplomatic conference and the potential impact of a diplomatic conference on the acceptability of the draft Convention.

E. Drafting matters

47. If agreement can be reached in a timely manner, the Commission may wish to refer the following matters to the drafting group.

48. Articles 2 (assignment) and 3 (internationality) are in chapter I (scope of application), while article 5 (definitions and rules of interpretation) is in chapter II (general provisions), since articles 5 does not deal mainly or only with scope-related provisions. However, article 5 contains important scope-related provisions that may need to be highlighted right at the beginning of the draft Convention (e.g. the definition of "location"). It may, therefore, be more logical and useful for the reader to have all the definitions and interpretations in one provision which could be article 2 (the present articles 2 and 3 could be subparagraphs (a) and (b) of that new article 2). Chapters I and II would be merged in one chapter entitled scope of application and general provisions.

49. The word "made" at the beginning of subparagraphs (a), (b) and (c) of article 4, paragraph 1 should be deleted, since it appears in the chapeau of article 4, paragraph 1. Reference should be made throughout the draft Convention to securities in general, rather than to investment securities.

50. In order to make it absolutely clear that representations take effect at the time when the assignment takes effect, the Commission may wish to revise article 14, paragraph 1 along the following lines: "Unless ... the assignor represents [...] that *at the time of the conclusion of the contract of assignment*: ..." (the position of the words in italics is simply changed). In addition, in order to ensure that the assignor will be held responsible if the receivable has not been validly created, words along the following lines may be inserted at the beginning of paragraph 1 (c): " the receivable exists and ...".

51. Usages and practices may bind the assignor and the assignee but not third parties (see article 13, paragraph 2 and A/CN.9/489, para. 107). Representations (that may stem even from trade and usages) are considered as being given not only to the initial but also to any subsequent assignee

(see article 14, paragraph 1 and A/CN.9/489, para. 111). The Commission may wish to confirm that the commentary appropriately reflects its understanding.

52. For consistency with article 1, paragraph 3, the reference to the law governing the receivable in article 41, paragraph 2 (b) should be substituted by a reference to the law governing the original contract.